UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 01-01139

- -x

In the Matter of:

W. R. GRACE & CO., et al.

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

3rd Floor

Wilmington, Delaware

November 23, 2009

10:34 AM

B E F O R E:

HON. JUDITH K. FITZGERALD

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: NONE LISTED

Telephonic Status Conference of State of California Appeal

Transcribed by: Hana Copperman

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P R O C E E D I N G S

THE COURT: Good morning, everyone. This is the matter of W. R. Grace & Company, bankruptcy number 01-1139. Everyone is appearing by phone. The list of participants is Scott Baena, Janet Baer, Ari Berman, David Bernick, Jeffrey Boerger, Thomas Brandi, Michael Brown, Elizabeth Cabraser, Linda Casey, Gabriella Cellarosi, Tiffany Cobb, George Coles, Andrew Craig, Leslie Davis, Michael Davis, Elizabeth DeCristofaro, Elizabeth Devine, Martin Dies, Melanie Dritz, Terrance Edwards, Lisa Esayian, Marion Fairey, Richard Finke, Roger Frankel, Theodore Freedman, Michael Giannotto, Daniel Glosband, James Green, Robert Guttmann, Jonathan Guy, Matthew Harvey, Daniel Hogan, Robert Horkovich, Mark Hurford, Richard Ifft, Brian Kasparzk, Matthew Kramer, Arlene Krieger, Michael Lastowski, Peter Lockwood, Edward Longosz, Alan Madian, Kathleen Malkowski, Steven Mandelsberg, Douglas Mannal, John Mattey, Tara Mondelli, Karalee Morell, James O'Neill, David Parsons, Carl Pernicone, Margaret Phillips, John Phillips, Mark Plevin, Francine Rabinovitz, Joseph Radecki, Natalie Ramsey, Tracy Rea, James Restivo, Alan Rich, Ilan Rosenberg, Samuel Rubin, Alan Runyan, Jay Sakalo, Darrel Scott, Mark Shelnitz, Michael Shiner, Walter Slocombe, Daniel Speights, Shayne Spencer, Theodore Tacconelli, David Turetsky, Edward Westbrook, Jennifer Whitener, Jeffrey Wisler and Richard Wyron. Ms. Baer?

MS. BAER: Good morning, Your Honor. Janet Baer on

behalf of W. R. Grace. Your Honor, we have a pretty quick agenda today. Although it was long most matters have been resolved or continued. Agenda item number 1, Your Honor, the objection to the Massachusetts Department's tax claim, that's being continued, once again, to the December 14th hearing.

THE COURT: Are you folks actually working toward a settlement? This has been a long pending matter.

MS. BAER: It certainly has, Your Honor, and I talked with the client as recently as two weeks ago. It is a complicated tax matter that is running through the tax appeals process. And the objection needed to be filed in order to get the process going, but it makes no sense, frankly, to have you take your time and attention on it, because it is working its way through the appropriate IRS tax appeals with the appropriate officers. And so, unfortunately, it has to keep getting continued, but it is very much being worked on.

THE COURT: All right.

MS. BAER: Thank you, Your Honor. Your Honor, the second matter on the agenda is the debtors' twenty-fifth omnibus objection. Little by little, Your Honor, we are getting through those. There are a few remaining matters that we're going to try to get resolved in the next month or two. The Munoz matter is actually being continued to March 22nd. We'd like the rest of the pending objections still not resolved to be continued to the December 14th hearing.

THE COURT: All right. That's fine.

MS. BAER: Your Honor, agenda item number 3 is the debtors' objection to the Maryland Casualty claim. The parties are in discussion on that matter, and we've agreed to continue that one to the January 25th omnibus hearing.

THE COURT: All right.

MS. BAER: Agenda item number 4, Your Honor, is General Insurance Company's motion to file a late proof of claim. The parties are talking with respect to that. We're doing some investigation about exactly who was served with the notice of commencement and the bar date and what the implications of those various services are, but the parties have agreed to continue that matter to December 14th.

THE COURT: All right.

MS. BAER: Your Honor, agenda items 5, 6, 7 and 8 are all claims, related matters that have been resolved and you have entered orders on each of those.

THE COURT: All right.

MS. BAER: Agenda item number 9, Your Honor, was the Munoz motion to lift stay that was argued at the last hearing, and Your Honor indicated that that matter should go to mediation. The parties are working on an order with respect to that as well as working on where the mediation will be and what the process will be. That matter is being continued until the March 22nd hearing while we work that through and, hopefully,

do the mediation.

THE COURT: All right.

MS. BAER: Your Honor, agenda item number 10 is the Fireman's Fund Company motion to lift stay. The parties are also in settlement discussions with respect to that in the hopes that we can resolve it. That matter is being continued to December 14th.

THE COURT: Okay.

MS. BAER: And, Your Honor, the final agenda item is the status on the California appeal with respect to certain claims that were remanded to your court. I understand that Ms. Rea from the Reed Smith firm is on the phone, and she will be addressing the status of that matter.

THE COURT: All right. Ms. Rea?

MS. REA: Good morning, Your Honor. Tracy Rea on behalf of the debtors. Your Honor, we're here to discuss how to proceed with respect to the sixteen property damage claims filed by the State of California Department of General Services against the debtors in these proceedings. In order to determine where we should go from here it's important to review where we've been on these claims.

As the Court will recall, in January of 2007 we had 627 asbestos property damage claims pending against the debtors that the parties were attempting to resolve through summary judgment motions and settlement negotiations. The Department

of General Services sixteen property damage claims were included among the 627 claims the debtors were dealing with at that time. On February 16, 2007 the debtors filed summary judgment motions on several categories of claims that encompassed most of the then pending 627 claims. The Department of General Services claims were subject to a summary judgment motion filed by the debtors based on the uncontested fact that in 1990 the Department of General Services joined in a petition filed in the United States Supreme Court asserting asbestos property damage claims against the debtors. The debtors argue that because DGS had asserted asbestos property damage claims against them more than three years before debtors' Chapter 11 petition, DGS's claims were barred by the applicable three year statute of limitations.

The Court agreed and entered an order disallowing and expunging DGS's sixteen claims on October 10, 2008. DGS filed an appeal with the District Court, and the District Court reversed on September 29th of this year. Under the legal standard adopted by the District Court, which we think is erroneous, debtors are now required to show that there was contamination through asbestos fiber release in each of the sixteen DGS buildings more than three years before debtors filed their Chapter 11 cases in April of 2001.

The only possible way for debtors to meet that standard which, again, we believe is the wrong standard, would

be to obtain records from DGS showing what they were doing in these buildings in the 1980s and 1990s, including repairs, abatements, surveys, renovations and testing. Now, we know that in 1985 DGS filed a billion dollar claim in the Johns-Manville bankruptcy for asbestos property damage claims in over 9,000 of its buildings. We only discovered the Manville claims, now, after the Court had entered its October 10, 2008 order expunging the DGS claims, and that's because DGS did not disclose the Manville claim on its proof of claim forms that it filed in the bankruptcy.

In addition, DGS did not include much by way of documentation with its claims form. From what it did include, it's clear that DGS was performing asbestos surveys in the buildings at issue as early as 1986. In one of the sixteen buildings DGS received a recommendation in 1986 that asbestos containing fireproofing had to be removed from the building at a cost of over 200,000 dollars.

In addition, the California Department of Corrections appears to have had an extensive asbestos operation and maintenance program in place by at least 1990. DGS only produced the cover page of that document, however, with a few of its claim forms. So DGS clearly has additional information relating to asbestos in its buildings that based between 1986 and 2001 that was not produced in connection with the claim form.

The District Court's memorandum opinion specifically states that it, quote, "Does not foreclose any further attempts by debtors to have the sixteen claims dismissed on the basis of the statute of limitations". The District Court only reversed the summary judgment finding and remanded to this Court, specifically, for further proceedings.

In light of the new legal standard adopted by the District Court and the fact that we have incomplete information from DGS on the limitations issues debtors are requesting that the Court set a short period for discovery, followed by a status conference to set a trial date on the statute of limitations issues.

We appreciate that the original October, 2006 property damage CMO included a discovery cutoff date that passed after the debtors had filed their summary judgment motion. At that time, however, there was no reason to devote the debtors' resources to execute the discovery on the statute of limitations issues, further than pending 627 claims. In fact, with respect to DGS, we believed we had a judicial admission of contamination that proves that the statute had run. And the Court agreed with that. It's only due to the District Court's reversal that discovery is now necessary with respect to these claims. And in light of what we know from even the incomplete information that DGS has given us to date we believe that discovery will show that the claims are time barred, even under

the heightened and, we believe, erroneous standard that the District Court recently adopted.

The debtors would propose that the Court set March 30, 2010 as a deadline for discovery on the statute of limitation issues on these claims. That would allow for approximately four months of discovery. Debtors would then further propose that the Court set a status conference after March 30, 2010, as the Court's schedule will allow, to discuss a statute of limitation trial on the sixteen claims.

THE COURT: All right. I take it that there is no further appeal of the District Court order, correct? I mean, I haven't heard that from anyone. I haven't checked.

MS. REA: That's correct.

THE COURT: All right. Okay. Who is on on behalf of the California Department, please?

MR. MANDELSBERG: Your Honor, Steven Mandelsberg from Hahn & Hessen. Good morning. We represent, as you know, the State of California Department of General Services. A few points, Your Honor. First of all, I don't want to reargue the appeal or the motion papers, but a few statements of Ms. Rea are simply not correct, and among them are the statements about the Johns-Manville claim and discovery. It's the state's position that the U.S. District Court's decision of September 29th is a final and un-appealable decision. And it's quite clear that as many times as W. R. Grace refers to the standard

adopted by the District Court as being erroneous, the fact is that that is now the law of the district, the laws of this case. It's un-appealed. It's final and binding. The District Court did remand the matter for further proceedings to Your Honor. However, we don't believe that there is any showing made by Grace to permit discovery several years after the last CMO was issued in this case. Your Honor will be reminded that in the course of the summary judgment motion papers, and even on the District Court appeal, the State of California pointed out that W. R. Grace had the opportunity to ask for any of the information that it's asking for now, previously. It chose to file the summary judgment motion as it did, identifying the issues that it thought were dispositive. It didn't ask for the information that it says it's asking for now. And there's no excuse given for why, since the October, 2006 CMO, W. R. Grace didn't then, or didn't in the interim, try to seek any discovery. It would be quite remarkable to allow discovery on statute of limitations issues years after the fact when W. R. Grace could have and, certainly, had no reason not to, seek discovery then. So it's a real, quite a remarkable passage of time to start digging into discovery on issues that they knew of and could have discovered back then.

In addition, Your Honor, we think that asking for a schedule of March 30, 2010 for discovery is quite lengthy. I think that in the proposed CMO that was attached to the case

management order for the Class 7A Asbestos PD Claim both parties actually reserved the right to address in any papers that would be filed formally any objection to requests for discovery. So it is true that the parties preserved the right to request. W. R. Grace could request discovery on statute of limitations, and the state could oppose it. This is the first time since the September 29th decision that we have had any communications from W. R. Grace indicating that they were going to seek discovery on these issues. We tried to get a handle on this earlier, and it was deferred for this conference. So rather than set a schedule right now, I think more appropriately would be that if W. R. Grace is seeking discovery on certain issues it's up to them, it's their burden, to show why the Court should relieve them of the October, 2006 CMO. They should file a motion to relieve themselves of that, and they should establish showing, and the proper procedure would be rather than to simply grant W. R. Grace's oral request at this time for them to be required to establish that they have a right to this discovery.

Moreover, Your Honor, I suggest that, of course, this is something that's up to the Court and the parties, but Your Honor may recall that while the summary judgment motion was pending before Your Honor during the months that it was pending, the Court had suggested that the parties proceed with mediation, and they did proceed with mediation. It was not

successful, but one of the reasons it was not successful, as Your Honor, or productive, as Your Honor may recall, was that the summary judgment motion was pending. And as Your Honor may remember, that mediation was held before retired Magistrate Judge Diane Welsh, and as Your Honor, Mr. Restivo and Ms. Rea may recall, after that mediation Judge Welsh indicated by e-mail to the parties and to Your Honor on July 2, 2008 that she would be happy to meet with them again after the summary judgment decision had been rendered and after any appeal on that decision had been rendered.

So I might suggest that instead of devoting further time and resources to this long litigation over the State of California's sixteen claims it might be useful for the parties to indicate whether or not they wish to pursue the continuation of that mediation session. But whether or not that occurs, as I say, I think the more appropriate procedure, rather than setting a schedule now, would be to set a schedule for W. R. Grace to file any motion that it wishes to, specify precisely the discovery it seeks and why it couldn't and didn't seek it earlier.

THE COURT: Ms. Rea?

MS. REA: Your Honor, as I mentioned previously, I mean, a CMO was set in place at a time when there were 627 claims pending. We did file a summary judgment motion based on the usual admission that we believed was dispositive. We were

attempting to deal with a large number of claims at that time. The District Court order that just came down changes the landscape in terms of what the legal standard is and what the debtors are now required to do. If you look back at the documents in this case, and you look at even the State of California's responses to the omnibus objections, one of their responses states that air and dust sampling data is not relevant to the claim. The claims are not based on air level or fibers in the property. So DGS objected to providing air and testing sampling and did not provide that information because they believed it was not relevant to the claim. This District Court opinion makes it a very different landscape in terms of what the statute of limitation is, and based on that we believe that it's imperative that the debtor get discovery on what DGS knew. We have partial information on the claim forms, but even on that information it's apparent that there was a lot going on in these buildings, and, again, with respect to the Manville claim, which was not disclosed on the claim form, it's apparent that they were seeking a billion dollars in 1985 with respect to asbestos property damage claims, and the debtor should be able to seek discovery on that claim.

THE COURT: Well, that may --

MR. BERNICK: Your Honor, this is --

THE COURT: I'm sorry?

MR. BERNICK: Yes, this is David Bernick. Just a

historical footnote, but it's very important. If Your Honor will recall that there was considerable dialogue during the course of the consolidated proceedings about the extent to which building specific discovery would be appropriate. And the whole way that the litigation process was structured was to work with the claim forms and the attachment to the claim forms. In that regard we were also dependent upon the completeness of the responses to the questions on the claim form. Yet, obviously, we now know that the responses that were provided by the state were not, in fact, complete.

But be that as it may, there was never an anticipation that to the extent that a claim would survive the dispositive motion practice, that there would be no further discovery in connection with that claim. These were dates that were set up, that were designed to foster a consolidated motion practice, which, in fact, did take place. They were not designed to preclude all further discovery, which, obviously, would be necessary, if, and to the extent, these cases were to go to trial.

The second fact is that whatever the situation was with respect to this particular claim, it's kind of idleness to suggest that somehow a motion has got to be filed to conduct what the District Court has said is "parties are free to pursue", which is further development of facts in connection with this issue. The remand order makes that completely clear.

So while the sentiment in favor of continued mediation is a good sentiment -- there's always an opportunity to settle cases -- Grace has, of the track record that we've established in these cases, always pursued the settlement discussions. When there's no opposition to the idea that that is always appropriate, to somehow put us back to motion practice to do what the District Court already has opened the door to do, is just letting time pass by. We just want to get to the discovery that's necessary and, then, be in a position to raise this issue, as the District Court has contemplated.

MR. MANDELSBERG: Your Honor, Steven Mandelsberg for the State of California Department of General Services. I think the dialogue we're having now is proof positive why the Court really shouldn't and won't be able to determine or request discovery based on counsel statements that I respectfully suggest are rebutted by the record.

First of all, this business of the statements of W. R. Grace that the state's responses to requests were somehow less than candid or less than complete is utter hogwash. It was raised, Your Honor, at the district court level. It was raised extensively in the brief. The District Court rejected it, as did the District Court reject the notion that somehow the Johns-Manville proof of claims filing provided an independent or alternative basis for affirming Your Honor's summary judgment decision. So the notion that we're sitting here now,

more than two years after this summary judgment motion was argued, and W. R. Grace is now saying that they didn't realize what the issues were, is utter nonsense. The issues about the difference in the approval standard was a matter of sharp debate, both back in April of 2007 when the motion was argued before Your Honor, as well as during the briefs and motion papers, as well as during the District Court appeal. To suggest that W. R. Grace didn't seek discovery because they assumed that they were correct and the state was wrong about the accrual standard and that therefore there would be no reason to seek discovery in case they were wrong, is ridiculous.

Moreover, the motion for summary judgment that W. R. Grace counsel refers to was filed after the close of discovery. There was nothing to prevent them from seeking discovery on alternative issues. The fact that they chose to file a summary judgment on a single issue, the fact that they chose to concentrate their efforts on litigating the fact or the question as they saw it, that it was a no-brainer that the state was foreclosed because of judicial admission doctrine or similar principles, was their choice. They might have sought discovery elsewhere, just in case, as parties do in all cases and this party has done and as W. R. Grace has done in this very proceeding on any number of issues.

So I don't think that counsel is reciting directly the

history of the arguments and discovery in this proceeding, and I do think that to the extent that W. R. Grace wants to seek discovery now, more than three years after the CMO referring to discovery on statute of limitations, and, Your Honor, after W. R. Grace was perfectly content to seek discovery on other issues. Your Honor may recall that while the summary judgment motion was pending as to the State of California's claims we had an evidentiary product ID hearing before Your Honor. Now, W. R. Grace wasn't precluded from seeking discovery then. They understood how they could seek discovery. They took depositions of the state's experts. So the matter proceeded on alternative tracks, and certainly W. R. Grace could have done so.

In short, Your Honor, to the extent they're seeking discovery they should make a showing by motion, and, in short, Your Honor, I really do suggest that since this has been the issue that has bedeviled the possible resolution of this claim, the Court may want to direct the parties to, before they spend any more money on litigating this, to continue a mediation session before Judge Welsh or before another mediator of your choosing.

THE COURT: Well, I agree that it should go to mediation before you spend a whole lot more money looking into whatever the discovery issues are. My understanding of the discovery order that I entered was that it was to facilitate,

as Mr. Bernick said, the mass resolution of issues to the extent that they could be lumped together and not to foreclose discovery for trial issues in the event that there was not a resolution on the summary judgment statute of limitations issue.

So, to the extent that the parties need discovery for trial, in my view that was never foreclosed. I'll have to go back and take a look at the orders. I did not do that in preparation for this status conference, but that's my general recollection, Mr. Mandelsberg. But I wholly agree that before you go down that road the debtor has been very successful in settling nearly all property damage claims that have not been disposed of by some other resolution, Court ordered resolution, and it seems to me that you should return to mediation first.

The District Court does, indeed, say that the debtor is free to re-raise these issues after some fact-based analysis, and, so, I'm not exactly sure how, without discovery, we're going to get to that resolution. But I took that to mean for trial purposes. I'll look at the District Court's opinion again as well. I don't really see the two bites of the apples on summary judgment motion process. If you're going to raise those issues you should raise them at one time, not seriatim. So I think what will happen is if mediation is not successful then I will probably open discovery for purposes of trial matters and then set a scheduling conference. But you should

go to mediation first.

So how much time and can you work out a process?

MR. MANDELSBERG: Your Honor, Steven Mandelsberg from Hahn & Hessen again, for the State of California Department of General Services. I know the holidays are upcoming, but I would think that we should be able to get together on a schedule and a mediation session within sixty days.

MS. REA: And, Your Honor, this is Tracy Rea on behalf of the debtors. I have not spoken to our client with respect to this concept, but, certainly, I will do so immediately, and we'll try to get, obviously, with Mr. Mandelsberg in that time period.

THE COURT: Well, why don't I continue this hearing until the -- I'm not sure. Ms. Baer, I'm sorry, do you have the January hearing date for summaries? I managed to come with the 2009 but not the 2010 list.

MS. BAER: I do, Your Honor. The January date is January 25

THE COURT: All right. That's a good date. I'll put this back on the agenda for January 25th.

MR. MANDELSBERG: Your Honor, Steven Mandelsberg, again, from Hahn & Hessen. Will that be for a status conference?

THE COURT: Yes, Mr. Mandelsberg. I want to make sure that you folks actually have come up with an acceptable

mediation order, and/or maybe we'll have done the mediation by then. I'm really not sure. I haven't looked at this for too long, and, I'm sorry, but I don't recall whether the order that authorized Judge Welsh to do this terminated when it was not successful. I do recall getting the communication from here indicating that she was more than willing to sit down with the parties again, but I don't know if I need to do another order to that effect or whether you folks can just go and make arrangements with her. If you can make arrangements and you are willing to go back with her, that seems fine to me. I don't see why I need to get involved in that process, except to know whether you have or haven't done it and settled. So I think if I just put this back on the January 25th agenda for a status report to find out what you've been able to do between now and then, that that will be fine. So if you have not finished the mediation before then then I expect to at least have an order from you that will set the schedule for mediation by that date.

MS. REA: Yes, Your Honor. This is Tracy Rea. We will look at that order and see if we need to submit a new order or if we can simply proceed.

THE COURT: Okay.

MR. MANDELSBERG: Your Honor, Steven Mandelsberg again. That's fine. I do believe that the parties made submissions to Judge Welsh, so it may not be any more

complicated than simply supplementing those submissions, checking the order and fixing a date.

THE COURT: Okay. Well, I will expect that if I need to do some order that you folks will send me one on a certification of counsel that's related to today's agenda, and otherwise that you will just progress on your own to get the mediation set up. If there's some issue I'm sure I'll hear from you. So I'll do a status conference January 25th to find out what the lay of the land looks like at that time, and, hopefully, you'll be able to resolve this. If not, then at some point we will discuss a trial schedule. Okay. Any --

MR. MANDELSBERG: Very well.

THE COURT: Anything further today?

MS. BAER: Your Honor, there's nothing further on the agenda. I believe all of the response plus trial briefs came in last Friday. Hyperlinks (ph.) are due on December 2nd, and then the last briefs you'll be getting in before closing arguments are the Anderson Memorial briefs due on December 8th, and that's responded December 23rd.

THE COURT: Okay.

MS. BAER: Thank you. Have a great Thanksgiving.

THE COURT: Thank you. You too.

ALL: Thank you. Have a great holiday. Happy Thanksgiving.

THE COURT: We're adjourned. Thank you.

(Proceedings concluded at 11:05 AM)

C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman

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